

Wang (Migration) [2018] AATA 2629 (13 June 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Xiaolong Wang

CASE NUMBER: 1703456

DIBP REFERENCE(S): BCC2016/2889641

MEMBER: Moira Brophy

DATE: 13 June 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2)(d) of Schedule 2 to the Regulations.

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Statement

made on 13 June 2018 at 11:21am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) – Subclass 820 (Partner (Temporary)) visa – Schedule 3 Criteria – Did not have a substantive visa at the time of application – Compelling reasons – Cares for the Sponsor's children – Special bond – Sponsor and Review applicant expecting first child – Decision under review remitted for reconsideration

LEGISLATION

1. *Migration Act 1958 (Cth)*, s 65
Migration Regulations 1994 (Cth), Schedule 2 cl 820.211 Schedule 3 Criteria 3001, 3003, 3004

CASES

Babici v MIMIA (2005) 141 FCR 285
MZYPZ v MIAC [2012] FCA 478
Waensila v MIBP [2016] FCAFC 32

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STATEMENT OF DECISION AND REASONS

ISSUE

2. The issue in the present case is whether there were compelling reasons for not applying the Schedule 3 requirement that the applicant be the holder of a substantive visa at the time of application or make the application within 28 days of being the holder of a substantive visa.

APPLICATION FOR REVIEW

3. This is an application for review of a decision of a delegate of the Minister for Immigration on 21 February 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant applied for the visa on 31 August 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d) because the delegate was not satisfied there were compelling reasons to waive the Schedule 3 requirements.
6. The applicant, Mr Xiaolong Wang appeared before the Tribunal on 6 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Ms Yingshi Tang. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
7. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
8. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.
9. *Background*
10. Mr Xiaolong Wang Ye is 28 year old male from China. He has declared no previous relationships. His parents and one sister reside in China.
11. Departmental records indicate the immigration history of the visa applicant is as follows:
 12. • On 13 September 2014 he first arrived in Australia, on a Student (subclass 573) visa which was cancelled on 17 August 2016.
 13. • On 31 August 2016, the visa applicant applied for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner (Residence) (Class BS) (Subclass 801) visa.
 14. • A Bridging (subclass C) visa was granted which remains in effect to date.
15. Ms Yingshi Tang is a 30 year old born in China and now an Australian permanent resident. She was previously in a relationship with Mr Raymond Jun Hai in the period from 1 July

2010 to 1 June 2015. There were two children from the relationship. Her parents and one brother reside in Australia.

16. On their application form the parties stated they met in September 2015 in Campsie. They committed to a relationship on 15 October 2015. They were married on 1 May 2016.
17. On 31 August 2016 Mr Wang lodged an application for a Partner visa (subclass 820 and 801).
18. In the Decision Record the delegate was not satisfied the applicant satisfied the requirements for the grant of the visa because he was not the holder of a substantive visa at the time the application was lodged and there were no compelling reasons at the time of application to not apply the Schedule 3 requirements.
19. Prior to hearing the applicant provided additional documents to the Tribunal including but not limited to the following:
 - A certified copy of their Marriage Certificate;
 - Statutory declarations attesting to the relationship between the applicant and sponsor being a genuine and continuing relationship;
 - Bank statements for account held in names of applicant and sponsor;
 - Photographic evidence.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files as well as the oral evidence provided at the hearing.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

21. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
22. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

23. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
24. Mr Wang's last substantive visa ceased on 17 August 2016 and he lodged the current Partner application on 31 August 2016.
25. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the

attachment to this decision. The relevant day in the present case is the day that the applicant last held a substantive or criminal justice visa, being 17 August 2016.

26. As the application for the visa was not made within 28 days of the relevant day, the Tribunal finds that the applicant does not satisfy criterion 3001.

Compelling reasons

27. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
28. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
29. The Tribunal has also had regard to policy guidance in the Department's Procedures Advice Manual (PAM 3) which states that the intent of the waiver provisions is to allow persons whose circumstances are genuinely compelling to regularise their status. The provisions are not intended to give, or be perceived to give, an unfair advantage to persons who fail to comply with their visa conditions or deliberately manipulate their circumstances to give rise to compelling reasons.
30. The Tribunal is not bound by Department policy. What amounts to compelling reasons in each case is a question of fact, having regard to all the circumstances of the case. To find whether compelling circumstances exist, the Tribunal is required to look at all of the circumstances of the case.

31. Reason for not holding a substantive visa

32. The applicant told the Tribunal that he was in the situation he was because he had been given incorrect information by the person who organised his visa. He had thought he was on a working visa. He was not aware he was on a student visa with a requirement that he be studying. He had paid \$40,000 to the person who arranged the visa and he only discovered it was a student visa some twelve months after he arrived in Australia. He said he had come with three others and they all found themselves in the same predicament. They had initially worked in a country area in a chicken factory. He said he did not know where it was but it was more than twelve hours from Sydney. He had then come to Sydney and worked on construction sites.
33. The applicant said he enrolled in an English course on 1 June 2016. He was aware from that time that he should have been studying for the visa he had been granted.
34. The Tribunal does not accept the circumstances as out lined above are a compelling reason to not apply the Schedule 3 criteria.

Effect of separation on family

35. The applicant said if he had to leave Australia for a period of time it would impact on his family. The parties gave consistent evidence of having lived together since their marriage.

The applicant does not work and he cares for the sponsor's young children. The sponsor is employed in her father's business supplying materials to the construction sector.

36. The sponsor spoke of her need to have the applicant remain in Australia and the need for him to be with his first child who was expected on 10 May 2018. The sponsor said her children had bonded with the applicant and they had worked hard to create a harmonious family for them. The father of the children was not involved in their life. She said the applicant was very involved with the care of her children and the applicant had forged a special bond with them. She was concerned for the effect on them if the applicant had to go offshore for a time. The sponsor considered she and her children relied on the applicant emotionally and he needed to be physically with them in Australia. The applicant told the Tribunal she felt very vulnerable and emotionally dependent on the sponsor particularly because she was pregnant. She said it had not been a planned pregnancy.
37. The Tribunal was mindful Australia is a signatory to the UN Convention on the Rights of the Child 1989 (CROC) and the International Convention on Civil and Political Rights 1996 (ICCPR), both of which protect the rights of children and families.
38. Articles 3 and 9 of CROC state:
39. *3. In all actions concerning children ... the best interests of the child shall be a primary consideration.*
40. . . .
41. *9. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. . .*
42. *Article 23 of the ICCPR states:*
43. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.*
44. Consistently with these international obligations, PAM3 sets out that in a situation where there are children in Australia whose interests could be affected by the decision the best interests of the children are to be treated as a primary consideration.
45. The Tribunal is satisfied it is in the best interests of both the applicant's unborn biological child and the young children of the sponsor that the applicant be able to stay in Australia and support the sponsor and their children.

Overall assessment

46. The Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).
47. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

48. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations.

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.